

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 02-3508

Michael A. Mitchell, also known as
Klayton Elway Eammelli,

Appellant,

v.

Mario Peart, Deputy Warden; Unknown
Gissler, Unit Manager HU3; Mark
Danner; Teresa Predmore; Sabatka
Rine; Harold W. Clarke, Director,

Appellees.

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Appeal from the United States
District Court for the
District of Nebraska.

[UNPUBLISHED]

Submitted: October 7, 2003

Filed: October 21, 2003

Before BYE, BOWMAN, and RILEY, Circuit Judges.

PER CURIAM

Nebraska inmate Michael A. Mitchell appeals the district court's dismissal with prejudice of his 42 U.S.C. § 1983 complaint, wherein he claimed Eighth Amendment violations based on his alleged exposure to environmental tobacco smoke (ETS). We affirm based on Mitchell's failure to establish administrative exhaustion--an issue

raised by defendants, but not addressed by the district court--and we therefore modify the dismissal to be without prejudice. Cf. McAlphin v. Morgan, 216 F.3d 680, 682 (8th Cir. 2000) (per curiam) (complaint properly dismissed without prejudice where plaintiff prisoner “did not satisfy his burden of showing” exhaustion).

Dismissal is required when an inmate has not exhausted administrative remedies before filing his lawsuit. See 42 U.S.C. § 1997e(a); Johnson v. Jones, 340 F.3d 624, 627 (8th Cir. 2003). Mitchell submitted no evidence of exhaustion with his complaint, and he admittedly had received no response to his most recent ETS-related grievance before he filed the instant lawsuit. We decline to entertain Mitchell’s arguments about the district court’s denial of attorneys’ fees and costs, and we deny as moot appellees’ motion for summary affirmance.
